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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Sears, Roebuck and Co. (hereafter "Sears")[1] opposes the issuance of a writ of certiorari to review the *per curiam* decision and judgment of the United States Court of Appeals for the District of Columbia Circuit which issued in this case on July 27, 1973 (Pet. App. A, p. 1a).

1. This suit was brought as a class action under Rule 23, F. R. C. P., by Sears on behalf of itself and other charging parties under the National Labor Relations Act. The District Court, however, concluded that it need not address the class question "[s]ince whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons." Pet. App. C, p. 4a, n. 1.

QUESTIONS PRESENTED FOR REVIEW

Petitioner General Counsel—the only government agency here involved notwithstanding the petition's misleading references to the "National Labor Relations Board" and the "Agency"[2]—has presented an issue which has not been involved in the instant controversy. Accordingly, Sears is compelled to restate the matters that have been at issue in this case:

1. Whether, based on the evidentiary record, presented to the District Court, that Court erred by finding that the General Counsel, as an independent agency under the Freedom of Information Act, 5 U. S. C. § 552, *et seq.* (hereafter "the Act"), failed to demonstrate that certain of his determinations constituted exempt intra-agency memoranda rather than "final options" or "mandatory . . . instructions to staff that affect a member of the public" (Pet. App. C, p. 7a) which must be indexed and disclosed under the Act.
2. Whether after permitting the deletion of any affiants names or references to settlement strategy, the District Court erred by requiring the General Counsel to justify in writing, as required by the Act, all other deletions in the determinations he disclosed and by also requiring the disclosure of any documents incorporated by reference or necessary to explain said determinations.

COUNTERSTATEMENT OF THE CASE

The General Counsel possesses the sole power under the National Labor Relations Act (29 U. S. C. § 151, *et seq.*) to institute proceedings before the National Labor Relations Board

2. At the District Court, the General Counsel conceded, indeed argued, that he and his office constituted an independent Freedom of Information Act agency, and the District Court so found. Pet. App. C, p. 6a, n. 4. This fact must be emphasized in light of the petitioner's repeated use of the amorphous term "agency" which does not distinguish between the Board and the General Counsel and thereby confuses the issue. The correct caption, it is respectfully submitted, should have, as the sole petitioner, General Counsel Nash.

(hereafter the "Board"), and, as a result, controls an aggrieved party's access to the remedial processes of the Board. 29 U. S. C. § 153(d). As the independent agency vested with unreviewable authority, the General Counsel's decision as to whether to issue a complaint significantly determines the course of national labor policy.

By determining, for example, to dismiss a charge, the General Counsel can preclude Board review and thereby dictate the development of the law. See n. 9, *infra*. Sears commenced the instant action, on behalf of itself and other similarly situated persons, to obtain access under the Information Act to essentially two types of documents, which, Sears alleged, were decisions and instructions that determined if, and when, a remedy would be available under the Labor Act. The first documents, referred to as Advice Memoranda, were found by the District Court to contain the substantive agency law on "new questions arising in the field of labor relations" (Pet. App. C, p. 6a) which can, absent an appeal from an adverse determination, terminate action by the General Counsel. N. L. R. B. Statements of Procedure, §§ 101.6, 101.8. The other documents, referred to as Appeals Memoranda, were found to be final opinions which also set forth the action to be taken by the General Counsel as an independent agency. The procedures of the General Counsel, which result in the issuance of each of these documents, are described below.

A. The Advice Memoranda

An aggrieved person seeking relief from an unfair labor practice initiates agency action by filing a charge with one of thirty-six regional directors. N. L. R. B. Statements of Procedure, § 101.2. These regional directors act under the "supervision of the Office of the General Counsel" (N. L. R. B. Statement of Organization and Function, § 203.1) which has delegated to each regional director the initial authority, after investigating the charge, to decide whether to issue an unfair labor practice complaint and thereby commence proceedings before the Board. However, where the case involves novel or

certain complex legal issues periodically designated by the General Counsel, "the regional director . . . *must* submit the case for advice from the general counsel." N. L. R. B. Statements of Procedure, § 101.8 (emphasis added). In such "advice" cases, the regional director submits a statement of the facts and issues to a separate division of the Office of General Counsel, the Advice Branch in Washington, "along with the regional director's recommendations." Pet. App. C, p. 6a; see also e.g., the appendix below (hereafter "A") at 217-221. The Associate General Counsel in charge of the Advice Branch supervises the review of such "requests for advice and *formulates policy* on novel or unsettled procedural and *substantive matters* arising in unfair labor practice cases." Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment in the District Court, quoting from the N. L. R. B.'s Statement of Organization and Function, § 202.1.1 (emphasis added) at A. 190.

The process by which the Advice Branch "formulates" such "substantive policy" is well-established. The process, as described in great detail by the General Counsel to the House Subcommittee on the N. L. R. B.,[3] begins with a thorough study, which requires that a staff attorney "ascertaining the *applicability of prior Advice determinations*" and review of the regional file and any "*recommendations* formulated by the regional director" (emphasis added). Appendix A hereto, p. A4.[4] Oral argument by the parties is also granted in important cases such as the underlying Sears litigation here. The staff attorney then pre-

3. This presentation by the General Counsel, which the General Counsel conceded during oral argument below "basically" sets forth his current practices, is attached as an Appendix hereto.

4. The research is accomplished by utilizing an internal index of prior advice decisions which was only first made public during the course of this litigation. See, e.g., the repeated requests by the Labor Relations Law Section of the American Bar Association (hereafter "the Section") seeking such an index as found at Vol. II, 1970 Report of the Section, p. 7; Vol. II of the 1971 Report of the Section, pp. 233-237, 242-246; and Vol. II of the 1972 Report of the Section, pp. 217-220.

sents his views to an agenda of ranking members of the General Counsel's staff whose "decision is submitted to the General Counsel . . . together with any dissenting opinions . . . The General Counsel's *final determination* is [then] communicated to the Regional Office by way of an [Advice] memorandum for implementation." Appendix A hereto, p. A4; See, also Pet. App. C, p. 6a; A. 214; A. 223.[5] "In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and *a detailed legal rationale*, including any pertinent Board or Court decisions," Appendix A hereto, p. A4. (Emphasis added.)[6]

An aggrieved party, whose charge the Advice Branch has concluded does not constitute an unfair labor practice, thereafter receives a summary letter from the regional director notifying him that the regional director will dismiss his case if it is not voluntarily withdrawn. See, e.g., A. 24, but see A. 30 and A. 33. Such a refusal to issue a complaint may, in turn, be appealed to the General Counsel's Office of Appeals within ten days; however, the charging party is not permitted to see the Advice Memoranda whose decision he must appeal. Absent such an appeal, all agency action is entirely foreclosed. Of those who do choose to incur the additional expense of an appeal, only one in twenty succeed in obtaining issuance of a complaint and resultant access to the Board's processes.[6]

5. The General Counsel has conceded that only "rarely, if ever," does a regional director disregard an Advice decision. Pet., p. 4. Indeed, no evidence of even *a single instance* in which a regional director did not adhere to an Advice Branch decision was presented to the District Court by the General Counsel nor discovered by Sears in its extensive examination of Advice decisions (A. 104) and, at oral argument below, counsel for the General Counsel conceded that he knew of *no* instance where regional directors had refused to implement an Advice decision.

6. In its petition, the General Counsel continually refers to Advice Memoranda as containing settlement instructions and "security sensitive" material, but no examples of such documents were ever

B. The Appeals Memoranda

In the case of an appeal, the Office of Appeals, upon receipt of the regional file and the decision theretofore issued by either the Advice Branch or the regional director, follows a procedure similar to that utilized in the Advice Branch. Appendix hereto, pp. A11-14. An analysis of the facts, which are generally dispositive, along with a recommendation for the disposition of the appeal, is prepared and presented to an agenda comprised of the ranking members of the Office of Appeals. On the basis of the analysis and recommendations, the deliberations of the agenda and any oral presentation of the parties in important matters such as the Board case here, the decision of the Office of Appeals is made. This decision is reduced to an Agenda Memoranda or "Minute", which is cleared, "in the usual manner," through a Special Assistant to the General Counsel. The parties, however, are advised of the Appeals decision by a summary letter (Pet. App. C, pp. 7a-8a) which, if adverse, unless reconsideration is sought, closes the matter. Appendix hereto, p. A13.

C. The Instant Litigation

Following repeated denials by the General Counsel of Sears' request for access to Advice and Appeals Memoranda for utilization in a matter then pending before the Appeals Branch and now before the Board, the instant action was commenced in August 1971. In February 1972, nearly eight months after Sears first sought access to such decisions, the General Counsel announced that Sears would be provided a portion, but not all, of the information sought under certain specified conditions. Specifically, the General Counsel made available to Sears a theretofore secret index to Advice Memoranda in closed cases

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adduced before the District Court nor uncovered by Sears. In addition, the examples of Advice Memoranda appended to the Statement of Undisputed Facts (A. 94-100), which contain no such references, were accepted as representative examples of Advice decisions. A. 57-58, ¶ 6.

only; those Advice Memoranda in closed cases which Sears selected from that index; and those Appeals Memoranda selected by Sears after it was required to examine the approximately 8,000 unindexed Appeals Memoranda which had issued in the last five years.[7] The General Counsel refused to produce, however, the Advice or Appeals Memoranda in any pending cases, including the underlying matter which triggered the litigation involving Sears.

The District Court concluded that, after consideration of the undisputed facts and review of the requested documents, the Advice and Appeals Memoranda were "instructions" affecting the public and "final opinions" which were required to be disclosed under the Act. Indices thereof were also required to be compiled and made available for Memoranda which had issued after the effective date of the Act. Finally, the District Court required that, subject to deletion of the names of affiants, settlement suggestions and other matters justified in writing, where the Memoranda expressly incorporated by reference other documents or explanatory material, that information was to be considered part of the Memoranda. Pet. App. C, pp. 8a-10a. This decision was affirmed, without opinion, by Judges Miller, Wright and Robb of the Court of Appeals in a *per curiam* decision on the basis of the District Court's decision and *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710 (D. C. Cir. 1973) Pet. App. A, pp. 1a-2a.

7. Sears' analyses of the Appeals cases over the last five years revealed a 5% reversal rate, but in earlier years the rate was 6%. (Appendix hereto, p. A15.)

REASONS FOR DENYING THE WRIT

1. No Important Legal Issue Is Presented in the Instant Case: The Parties Do Not Dispute the Law but Its Application to the Peculiar Facts at Bar

Petitioner concedes that this Court has already resolved the basic legal question in this case in *Environmental Protection Agency* v. *Mink*, 410 U. S. 73 (1973), where this Court articulated the guidelines to be used in applying exemption 5 of the Act. Pet., pp. 10-11.[8] Accordingly, the case at bar merely presents an application of those principles to the unique set of facts involved in this case. In *Mink*, this Court stated clearly, and Petitioner does not dispute (see Pet., p. 11), that exemption 5 was to be "narrowly delimited" with the objective only of preventing injury "to the consultative functions of government" 410 U. S. at 87. The narrow scope of the exemption, accordingly, does not permit the withholding of documents which embody "the agency's effective law and policy . . . but [instead] only shields the Agency's group thinking process" as, e.g., the agenda process employed by the General Counsel. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967). The District Court properly concluded, therefore, after examining the evidence, that the documents here, admittedly issued, at least with respect to Advice memorandum, to insure that

8. The petition also places reliance on exemptions 2 and 7 of the Act although it concedes that it did not urge either of those exemptions to the courts below. Pet., pp. 12-17. While it is manifestly inappropriate to now assert these exemptions, even if they are applicable, they do not provide, in any event, justification for non-disclosure. To argue, as does Petitioner, Pet. pp. 12-13, that simply including a final decision within an investigatory file automatically precludes disclosure, would permit the exemption to engulf the disclosure mandate of the Act. An investigatory file cannot be used to hide substantive declarations of law and policy. Exemption 2 is similarly inapplicable. See, e.g., *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973) and *Hawkes* v. *I. R. S.*, 476 F. 2d 787 (6th Cir. 1972), rejecting the very claim advanced here.

new and novel questions are decided uniformly, were final orders and instructions of the General Counsel as an admittedly independent agency. Another agency or another set of documents may or may not be covered by the guidelines set forth in *Mink;* however, the instant case is but one factual application of those principles.

2. The Lower Court Correctly Applied the Law to the Instant Factual Circumstances

In *Kaiser* v. *Aluminum & Chemical Corp.*, 157 F. Supp. 939 (Ct. Cl., 1958), which petitioner concedes (Pet., p. 11) was expressly cited in *Mink* as evidencing the limited scope of exemption 5 intended by Congress, that exemption was construed, to cover only documents, which, unlike those here, were merely "opinions" from a subordinate to a superior that did not "reflect" or represent the position ultimately taken" by the agency. 157 F. Supp. at 493, n. 4. The instant case, however, presents a "different situation" (*G. S. A.* v. *Benson*, 415 F. 2d 878, 881 (9th Cir. 1969))—the disputed decisions here are issued by the agent that possesses the decisional authority and are, as are all orders from a superior to a subordinate, admittedly followed and implemented uniformly. Hence, "these are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be available to the public." *Sterling Drug, Inc.* v. *F. T. C.*, 450 F. 2d 698, 708 (D. C. Cir. 1971). The Act, as construed below, thus properly "enables an individual to conform his actions to the Agency's understanding of the law" (*Hawkes* v. *I. R. S.*, 467 F. 2d 787, 795 (6th Cir. 1972)) and permits "public criticism [that has] a salutary effect on the Agency and its staff." Davis, 34 U. Chi. L. Rev. at p. 778.

3. The Remainder of Petitioner's Claims Distort the Effect of the District Court's Decision

At present, the General Counsel is voluntarily disclosing and indexing the disputed memoranda in closed cases. This action implicitly concedes that such disclosure does not impede the Agency's administration. In addition, both the Act as well as the orders of the courts below permit appropriate deletions to be made from any documents to be disclosed. Indeed, the decision below arguably grants petitioner broader discretion than the Act would seem to permit by allowing deletions of settlement discussions and the names of affiants *without* the written justification which the Act would require. Accordingly, even assuming *arguendo*, that sensitive material is contained in the memoranda, a claim which was supported by no evidence in the court below, such material can be deleted if properly justified. The court below's disclosure order can in short, have only a minimal impact on the Agency's deliberate processes —especially when contrasted with the importance of disclosure to the Labor Bar and the public.[9]

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9. The importance of this substantial body of administrative precedent, heretofore withheld from the public, cannot be minimized. The large majority of unfair labor practice charges are never permitted to reach the Board. It is for this reason that the American Bar Association has consistently urged the General Counsel to disclose Advice and Appeals decisions in order to effectuate the legislative mandate of the Act. As early as 1970, the Labor Law Section of the A. B. A. concluded:

> These [Advice and Appeals memoranda] constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public.

Vol. II, 1970 Report of the Section, p. 7; see also Vol. II, 1971 Report of the Section, pp. 233-237, 242-246; and Vol. II, 1972 Report of the Section, at pp. 217-220. More recently, the Section stated with respect to this litigation (Vol. II, 1973 Report, p. 244):

> We commend the General Counsel for making available advice and appeals memoranda in completed cases. However, in view of the decision of the district court in *Sears*, the General Coun-

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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sel is required to make available all advice and appeals memoranda issued since July 5, 1967, and indices of the same. Your Committee continues to adhere to the view that where documents are expressly incorporated by reference in memoranda, they should be produced; that where memoranda rely upon "circumstances of the case" or some other vague or imprecise reference without delineating such circumstances, explanatory material should also be made available unless exempt under the Act; that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion; and that unless there are clear extenuating circumstances, documents requested should be produced with reasonable promptness.

APPENDIX.

OPERATIONS OF OFFICE OF NLRB GENERAL COUNSEL

[The following statements explaining certain operations of the Office of General Counsel of The National Labor Relations Board were submitted by NLRB General Counsel on June 29, 1961 to a House Labor Subcommittee on the NLRB and are reprinted by the Commerce Clearing House at 1 Labor Law Reporter, ¶ 1150.01.]

Advising NLRB Regional Offices

A major segment of the General Counsel's policy-making functions is placed in the Regional Office Advice Branch which constitutes a subdivision of the Division of Operations. The Advice Branch is headed by an Assistant General Counsel, who, with the assistance of an Associate Branch Chief, supervises and coordinates the work of 24 attorneys.

Essentially, the function of the Advice Branch is what its name implies. It formulates for the approval of the General Counsel, uniform policies in novel, unsettled or ambiguous areas of the law and furnishes advice to the various Regional Offices regarding the appropriate course of action in specific cases.

The Branch processes approximately 130 cases per month which reach the Washington office through two main channels. First, Regional Directors, at their own discretion, may submit those cases for advice which, in the opinion of the Regional Director, present either novel or complex issues which the Regional Director wishes to have resolved by the Washington office. Similarly, where Regional Directors are confronted with either complicating Board or Court precedent, or believe that the specific area of the law is ambiguous, they may, at their discretion seek advice from Washington.

The second major channel of communication in this area involves those categories of cases which Regional Directors are required to submit for advice because they concern issues wherein a uniform policy determination is essential to the sound and fair administration of the Act. Essentially, those cases fall in the following categories:

1. Cases involving the interpretation of the recently enacted amendments to the National Labor Relations Act, such as Section 8(b)(7) of the Act which concerns recognition and organizational picketing; Section 8(e) of the Act, which outlaws hot cargo contracts; and Section 8(f) of the Act which exempts the building and construction industry from certain provisions of the Act.

2. Cases which involve the interpretation of major Board or Court pronouncements which require analytical study and subsequent uniform application. Examples of such situations are cases involving hiring halls in the maritime industry; the validity of certain union security provisions such as agency shop clauses in so-called right-to-work States; and certain remedial problems such as the disgorgement of illegally withheld union dues.

3. Certain building and construction industry cases. The submission of these cases for advice is required because the building and construction industry, by its very nature, has certain unique problems which have traditionally required the closest attention by the Washington office. To mention but one of these it is, of course, generally known that due to the temporary nature of building projects and the fluid labor force engaged in construction work, the Board has encountered considerable difficulties in holding representation elections among building and construction employees. From this, of course, flows a number of problems which make the uniform application of the Act in this particular industry extremely difficult.

From time to time, as definitive policy determinations are reached in Washington, many of these areas are redelegated to the Regional Directors and the submission of such cases for advice again reverts to the discretion of the Regional Director.

Regarding the mandatory submission of cases, those points should be emphasized. In the first place, the fact that certain cases, and these do not constitute more than approximately 5% of the total case load, must be submitted to the Advice Branch, must not in any way be construed as a lack of confidence in the Regional Director or the Regional Office staff. On the contrary, it is our opinion that the Regional Directors and their staffs are highly competent and are an integral and essential part of the General Counsel's policy-making function. Thus, cases submitted for advice are invariably accompanied by recommendations formulated by the Regional Directors and their staffs, thereby enabling the Washington office to fully utilize the experience and thinking of the entire Regional staff. However, it can readily be seen that if 28 regional directors were to interpret novel legal issues and apply these interpretations within the confines of their Regions without any coordination by the Washington office, the end result would indeed be chaotic. Thus, the law would be interpreted and applied in one way in New York and in an entirely different way in Chicago, or San Francisco, or Atlanta. It must be stressed, therefore, that the advice function supplied by the Washington office is essential to a fair and uniform administration of the Act.

Secondly, the Advice Branch does not ordinarily review the Regional Director's factual determinations and conclusions and it does not interfere with the investigatory duties of the Regional Office, but rather, concerns itself with the interpretation and application of legal principles.

So much for the functions of this particular Branch. The actual operations of the Branch are as follows:

Cases submitted by Regional Directors are assigned by the Branch Chief or Assistant Branch Chief to individual staff attorneys. The attorney, under the guidance and with the assistance of his supervisor, studies the Regional Office submission memorandum which sets forth the facts of the case, the issues on which advice is sought, and the Regional Office's recommended action.

The Advice attorney, in most cases, also reviews the case file in order to clarify any ambiguities or to ascertain whether there are other legal or factual issues which should be considered. The reviewing attorney researches all cases in point and ascertains the applicability of prior advice determinations in similar or related cases. Having been reviewed the case is then submitted for further consideration to an Agenda. This Agenda, depending on the complexity of the case, is attended by various members of the General Counsel's staff. Ordinarily the participants at the Agenda meetings are: the Assistant General Counsel in charge of Advice; the Associate Branch Chief, the Assistant General Counsel in charge of District Court Litigation, the Special Assistant to the General Counsel, the attorney and supervisor who reviewed the specific case, and in many instances, the Associate General Counsel in charge of the Division of Litigation. Again, depending on the complexity of the case, cases may be submitted to the Agenda orally or by written memorandum. However, all submissions to the Agenda include the Regional Office's recommendations, together with any concurrence or disagreement by the Advice Branch. The Agenda decision is submitted to the General Counsel by the Branch Chief or Associate Branch Chief, together with any dissenting opinions. In special cases involving extremely complex issues, the General Counsel may schedule special Agendas and invite other staff members to submit their recommendations.

The General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch. In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions.

Because of the complexity or novelty of the cases submitted for advice, parties occasionally, and in approximately 1% of the

cases, seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position.

It must be emphasized, of course, that the number of cases submitted for advice represents but a fraction of the overall case load handled by the Regional Offices. Thus, during the past two years an average of 10% of the total case load has been submitted for advice. In this respect, it is also noteworthy that although the Advice Branch concerns itself with the most complex and novel legal issues and does not review de novo the factual conclusions of the Regional Offices, the litigation success during fiscal year 1960 was 82%. It must also be noted, however, that during the first half of fiscal 1961, this litigation success was reduced to 63% of the cases so far decided by Board decision or Intermediate Report. The difference may well be explained by the fact that a large number of cases involving the Landrum-Griffin Amendments to the Act have not as yet reached Board or Court determinations, but have been decided in a variety of ways by individual Trial Examiners.

It should be noted that the Advice Branch, like other operations of the General Counsel, is concerned with a speedy resolution of the issues presented to it. However, while time targets have been set for the handling of advice cases, it is fully recognized, as in the time targets in the Regional Offices, that disposition of a case within the allotted time—10 days—is an aim and not a strait-jacket. Flexibility with respect to the time for handling of cases is an absolute necessity and is recorded in the day-to-day execution of the advice function. Thus, cases of great complexity and difficulty may often exceed the 10-day

period, while other cases with relatively simple fact and legal issues are handled in less than 20 days. Also, cases which have statutory priority, and especially 8(b)(7) cases wherein the Statute specifically stresses the expeditious resolution of the case, are handled in a much shorter period than 10 days.

It should also be noted that these time targets cannot and do not apply to cases which may be deferred pending decision in related cases by the Board, Supreme Court or Circuit Courts of Appeals. For example, "flag of convenience" cases which were required to be submitted for advice, had been deferred pending the Board's decision in the *West India Fruit* case [1961 CCH NLRB Decisions ¶ 9654]. Similarly, cases involving agency shop issues in right-to-work States, have been deferred pending the Board's decision in *General Motors* [1961 CCH NLRB Decisions ¶ 9663], a decision which is presently pending reconsideration by the Board. Also, as an example, cases involving the *News Syndicate* issue, recently decided by the Supreme Court [42 LC ¶ 16,889], were deferred pending the Supreme Court's disposition of this issue.

In addition to the above, cases involving identical or similar issues may be decided together so that, on occasion, a specific case may be delayed until another related case is ready for disposition. Such deferral of a case is, of course, done in the interest of uniformity in approach.

Despite the great flexibility in the time targets and the overriding consideration that on no occasion will quality of the decision be subordinated to a time target, the Advice Branch is able to show impressive gains in the speedy resolution of cases. Thus, in December 1958, the mean average for handling of an advice case was 29.3 calendar days. By December 1959, six months after General Counsel Stuart Rothman assumed office, this figure was reduced to 14.9. By June 1960, the mean average days for the processing of an advice case was 11.8 calendar days. By December 1960, this was reduced to 11.1, and by March 1961, the mean average was 10.9 calendar days.

Nature of the "Advice" Function

Since 1947, when the Office of the General Counsel of the National Labor Relations Board was created, some kind of advice function has been performed at the Washington level with respect, *inter alia*, to significant, novel or complex cases and cases where uniformity in approach was of particular importance.

Absent some kind of centralized advice section into which important novel and complex level issues can be channeled, the risk of chaotic development in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.

The advice function is recognized as particularly significant in view of the broad regulatory scope of the Labor Management Relations Act, which encompasses dynamic, interrelated, interacting and sometimes conflicting rights and privileges. Restrictions in one statutory section have often to be considered together with privileges recognized in another. To make the statute's regulatory intent and design meaningful in a complete sense, a uniform approach which keeps in mind all pertinent interests under the statute is necessary.

Also, with respect to the General Counsel's role in interpreting the statute and developing the law thereunder, it should be appreciated that when he authorizes formal proceedings in a case, he becomes an advocate for the theory underlying the complaint which he issues. While the General Counsel may, on occasion, present a theory to the Board for decision with

respect to which the General Counsel is not in entire agreement, this does not mean that any and every question of law must be or should be put to the Board. Nor does it mean that any legal question should be put to the Board, immediately such issue arises. It must be kept in mind that when litigation is begun on a given theory of law, there may be highly unsettling effects in labor management relations while the issue is wending its way through Board litigation and adjudication, Circuit Court adjudication and possible Supreme Court decision. While this is ordinarily a concomitant of any important litigation which has broad impact, such an effect must give one pause in beginning the litigation unless it is believed that there are very strong reasons under the statute to do so. This concern may also be important in deciding when, if at all, litigation of a particular legal issue should appropriately be instituted.

Finally, it should be noted that while the Regional Offices are performing their functions at an extremely high level of competence and dispatch, no one Regional Office deals with more than a fraction of the complex and novel legal questions which are channeled into the Advice Branch. Thus, the experience of having researched, analyzed and hauled generally similar problems of law permits the Advice Branch to supply reasoned, correct and uniform answers to questions which a Regional Director, acting alone, would find extremely troublesome.

What, then, are some of the sources, criteria and factors considered in deciding cases submitted for advice? Many factors may be considered, dependent on the issue posed, and the advice decision may, on occasion, represent a balancing of such factors. In some cases, the course to be taken is clear while in others, it may not be. But in all cases a carefully reasoned basis exists for the conclusion and recommendation reached. Among the sources and factors which may be considered in reaching a conclusion in a given case are:

1. Supreme Court decisions;
2. Controlling Board law;

3. Court law where the Board position is not to the contrary;

4. Clear statutory language;

5. Legislative history;

6. The general policy of the Act;

7. The ascertainable purposes of the particular statutory sections involved in the case;

8. The impact of the alternative courses on settled law;

9. The individual case as an appropriate vehicle for testing a given issue;

10. The time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking reexamination of prior Board decisions.)

Examples of the utilization of each or combinations of these criteria could be readily given. In the interest of brevity, however, only one problem, but a highly important one, is discussed as an example. The question for advice was the disposition of concurrent charges of 8(a)(5) and 8(b)(7)(C) violation.

In considering the problem of the concurrent 8(b)(7)—8(a)(5) case, the primary alternatives were, on the one hand, to take the position that despite the existence of a meritorious 8(a)(5) case, the union's picketing to protest this illegal refusal to recognize and bargain nevertheless violated Section 8(b)(7). On the other hand was the alternative of deciding administratively that a Section 8(b)(7) charge lacked merit if the employer who was being picketed was illegally refusing to bargain with the union.

The procedure, recommended to and adopted by the General Counsel, was to defer proceedings on an 8(b)(7) charge where the employer involved, was concurrently and illegally refusing to bargain, as determined by an investigation of an 8(a)(5) charge. This was considered to be warranted in view of the highly unsettling effect the alternative procedure would have, particularly with respect to the rights of employees and unions

recognized under Wagner and Taft-Hartley. The alternative procedure, as noted, was to process concurrently the 8(b)(7) charge and the 8(a)(5) charge, thus requiring an injunction of the union's picketing while simultaneously taking the position in the 8(a)(5) case that the employer was *illegally withholding recognition* from the union. For reasons noted, the General Counsel was reluctant to adopt this position until some guidance could be obtained from Board's decisions in the 8(b)(7) area.

The General Counsel's approach, which was upheld in the court litigation of *Scott* v. *Rothmen* [41 LC ¶ 16,535],[1] has, in effect, sought to maintain privileges of employees and labor organizations until such time as the Board would indicate that such privileges were negated by the enactment of Section 8(b)(7).

It should be noted further that the 8(b)(7)—8(a)(5) cases, considered as an integrated fact situation, have not been deferred or suspended. Rather, the basic dispute, i.e., the employer's refusal to recognize the union, has been litigated before the Board. What has not yet been litigated in these situations is the question of whether a union is privileged to picket in protest of the employer's illegal refusal to bargain.

In some of the recent decisions of the Board, there is language in the majority opinions which suggests that an 8(b)(7) and 8(a)(5) violation can exist concurrently. *Charlton Press*, 130 NLRB No. 90 [1961 CCH NLRB Decisions ¶ 9717]. However, the issue is still not free from doubt, particularly since a motion for reconsideration has been filed in that case.

When the Board has finally spoken in the *Charlton Press* case, the procedure the General Counsel should adopt may well become clear. However, in view of its highly unsettling effect on labor relations generally, and its impact on settled law prior to enactment of 8(b)(7), proceeding on 8(b)(7) charges in the situations discussed above was not believed warranted absent some indication from the Board that concurrent processing of 8(b)(7)

and 8(a)(5) charges was contemplated and required by the new section.

Nature, Function and Administrative Operation of Office of Appeals

Under Section 102.19 of the Board's Rules and Regulations, provision is made for an appeal to the General Counsel from the refusal by a Regional Director to issue complaint. Whenever such refusal occurs, the Director so advises the charging party in writing, briefly stating the reason for his action, informing the party of his right to appeal and the date by which the appeal must be filed, and noting that additional time will be granted on a showing of necessity. Copies of the above letter are sent to all parties concerned. It should be emphasized at this point that the standard operating procedure applicable to all regional offices requires that the charging party be fully apprised of the reasons for the refusal to issue complaint prior to the sending of the letter. This procedure is designed to afford the charging party the opportunity to discuss the issues and offer further evidence prior to formal action, and to enable him to prepare his appeal intelligently in the event the regional office adheres to its position in the matter.

When an appeal is filed it is referred to the Office of Appeals which acknowledges its receipt, sending copies of the acknowledgement to all other parties and attorneys of record. The Regional Director with whom the Rules require a filing of a copy of the appeal, then forwards the entire regional office file to the Office of Appeals together with his comments concerning the position taken by the charging party in his request for review. While the file and comments are usually forwarded within 3 days of the receipt of the copy of the appeal, the Regional Director may in his discretion defer submission pending further investigation if such action is deemed necessary to resolve issues raised by the charging party in his appeal. Moreover, if, upon

further investigation, evidence is disclosed which, in the judgment of the Director, supports an unfair labor practice finding, he has the authority to withdraw his dismissal letter and issue complaint. In this event, all parties concerned are advised by the Office of Appeals that it is closing its file in the matter.

Upon receipt by the Office of Appeals of the regional office file and comments, the entire matter, including any statement which a respondent may care to submit, is assigned to a staff attorney for study. The latter, after examining the file and all relevant documents in detail, prepares a memorandum which contains a statement of the facts, an analysis of the factual and legal issues involved, and a recommendation for disposition of the appeal. The matter is then reviewed by a supervisor. Effective supervision is guaranteed by not assigning more than three attorneys to any supervisor. Any disagreement between the attorney and the supervisor is noted in the memorandum.

In due course the case is scheduled for consideration by the Appeals Committee, consisting of the Director and Associate Director of the Office of Appeals and a third top staff member, with a combined experience with the Agency totalling over 40 years. No staff personnel participating in the determination of an appeal have had any connection with the case at any earlier stage.

The Appeals Committee meets twice each week to consider a case agenda prepared sufficiently in advance to afford Committee members the opportunity to read the memoranda and familiarize themselves with the cases. Each case on the agenda is considered in detail with both the attorney and supervisor freely participating in the discussion and expressing their views. If, in the judgment of the members of the Committee, the file does not contain sufficient information to permit a resolution of the issues in dispute, the case is remanded to the regional office with instructions to conduct such further investigation as is necessary to obtain the information in question.

If a party or his attorney in a given case desires an opportunity to present his views in person, a meeting is arranged for this purpose with equal opportunity being accorded to the other side. In cases where such meetings take place, a file memorandum is prepared by the responsible attorney setting forth the views expressed by the various parties concerned, and, in situations where it is deemed appropriate, a copy of this memorandum is forwarded to the regional office for comment.

On the basis of the original case analysis memorandum, the deliberations of the Appeals Committee, and upon any oral presentation made by the parties, the Committee makes its decision. This decision is reduced to the form of a "General Counsel's Minute" which covers the relevant facts and the reasons for the decision. This minute is cleared, in the usual case, through the Special Assistant to the General Counsel. When a case presents a novel or especially difficult problem, involves a policy issue, or is one in which there is disagreement among top-level staff personnel, the case is discussed in detail with the General Counsel who, in effect, reconvenes the Appeals Committee and participates in its further deliberations.

All parties concerned and their attorneys are advised of the decision by letter. While this ordinarily closes the matter, requests for reconsideration are entertained. In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the charging party in support of his request and all interested parties are notified of the disposition of the matter.

From what has been said above, it is clear that every effort has been made to provide "administrative due process" in the handling of appeals cases. I want to assure the Committee, however, that this Office is keenly aware of its continuing responsibilities in this area. To this end, a study is currently under way to determine whether any improvements can be made in our case handling processes. In this connection, I have recently taken the opportunity to reemphasize to all Regional Directors

and Officers-in-Charge the necessity of making certain not only that a charging party is fully informed concerning the region's position prior to the issuance of the formal dismissal letter, but that if such information is conveyed orally the charging party fully understands the basis for dismissal, and that if the Regional Director has any doubt that such understanding exists, the reasons for dismissal must be expressed in the dismissal letter itself.

Office of NLRB General Counsel

At this point, I would like to address myself to the suggestion, which witnesses have made to the Committee, that all cases involving factual issues should be sent to hearing before a trial examiner rather than dismissed administratively. Since the vast majority of cases do present factual issues of one kind or another, and only some of these involve credibility, as discussed in Appendix C [not published], adoption of the suggestion would have required in fiscal 1959, for example, the issuance of complaint in almost 10,000 additional cases. The serious impact that such a course would have had on the Agency's already heavy backlog, with only 2,100 complaints issued during that year, is obvious. Moreover, I am at a loss to understand the justification for adopting a different standard for the Board's operations from that which is applicable to other governmental agencies, including district attorneys, whose day-to-day operations require the making of credibility resoultions in deciding whether to proceed in a given case. In my view, not only would such a procedure impose an undue and unreasonable burden of litigation on respondents, employers and unions alike, merely because someone, uninhibited even by the deterring costs confronting a private litigant, sees fit to file a charge however lacking in merit, it would also cripple the processes of the Agency by producing untold delay, with its consequent effect on the parties, in a field where the very proponents of this procedure recognize that time is peculiarly of the essence. I cannot be-

lieve, for example, that those who espouse the indiscriminate issuance of complaints have given sufficient thought to the effect such course would have in preventing a prompt resolution of questions concerning representation through the filing of blocking charges. More specifically, the indiscriminate issuance of meritless complaints would effectively prevent the holding of representation elections with the necessary consequence of leaving unsettled industrial relations in very broad areas of our economy. In fact, such indiscriminate issuance of complaints could effectively nullify the representation machinery of the Act and negate the legislative policy of fostering industrial peace.

The suggestion has also been made that the relatively small number of cases in which the Regional Directors' refusals to issue complaint have been reversed on appeal supports the contention that the Office of Appeals is "rubber-stamping" the Directors' action. The Committee should bear in mind in this connection that the percentage of reversals (on the average about (6%) will necessarily be small since all of the cases on appeal have been subjected to careful evaluation at the Regional Office level by top-echelon field personnel, the great majority of whom have had long years of experience and proven integrity and ability, [which] provides a firm guarantee that the decision in every appeals case is made on the basis of a careful *de novo* evaluation and review of the evidence disclosed by the field investigation. In the final analysis it is the character and caliber of the men who perform the function more than the structure that determine its quality and fairness, which constitute at once the objective and foundation of due process.